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Concluding reflections

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Concluding reflections

A. INTRODUCTION

The contributions to this Symposium have shown that, as compared to other jurisdictions, Scotland has in some ways been ahead of the curve. This is certainly true with regards to the protection of the rights of the surviving spouse. Already in 1964, the Scottish legislature decided to award the surviving spouse most or, usually, all of the deceased’s estate albeit, as we have seen,¹ without careful deliberation. In addition, Scotland is one of the very few European jurisdictions to protect the interests of cohabitants, though, unlike in the case of spouses, the protection has arguably not gone far enough.

We have also learned something about the dangers inherent in law reform and the role historical accidents can play in bringing about change.² The contributions further reveal that reform can prove difficult partly because the starting point for deliberations is usually the law that is already there so that some of the important questions are no longer expressly articulated or addressed. In other words, the legacy of the immediate past is not always the best basis from which to proceed. As the contributions illustrate, sometimes it is necessary to take a step back to be able to see new (or old) solutions and, importantly, to be able to ask what is it that we are trying to fix and why.

B. THE STATE OF THE ART

The contributions confirm that dissatisfaction with the current state of the law in Scotland is not without justification. Several of them highlight instances of incoherencies and inconsistencies that can lead to irrational and arbitrary results. Kenneth Reid shows, for example, that due to the lack of coordination between intestate succession laws and legal rights, a surviving spouse may be better off under intestacy than as sole beneficiary under the deceased’s will, and thus may be inclined to create an artificial intestacy, at the expense of the deceased’s children. Jan Peter Schmidt³ illustrates that although the approach of giving most or even all of the estate to the surviving spouse on intestacy rests on a sound foundation, it is problematic in some cases, particularly where the surviving spouse/civil partner is not the biological parent of the children of the deceased. As Kenneth Reid and George Gretton highlight, some of the absurd results here are caused also by the fact that legal rights are currently only based on the moveable estate.⁴

¹ K Reid, “Mixing without Matching: Fractions, Slabs, and the Succession Rights of the Surviving Spouse and Children” (2020) 24 EdinLR 00.

Reid (n 1) and D Reid “Why is it so difficult to reform the law of intestate succession?” (2020) 24 EdinLR 00 on the spouse’s accidental prior rights and the role the 2011 prior rights uprating has played.

³ JP Schmidt, “Trying to Square the Circle: Comparative Remarks on the Rights of the Surviving Spouse on Intestacy” (2020) 24 EdinLR 00.

⁴ Reid (n 2) at 00 and G L Gretton, “3-D Vision is Difficult: Dissolution, Death, Divorce” (2020) 24 EdinLR 00.

In addition, focusing on the lack of alignment between the consequences of dissolution of a marriage on death and dissolution on divorce, George Gretton demonstrates how this can lead to puzzling outcomes.⁵ More importantly, as Jan Peter Schmidt shows, the lack of a formal dissolution of matrimonial property on death tends to overburden intestacy rules, and to favour the surviving spouse to the detriment of the issue.⁶ Similarly, Gregor Christandl's contribution highlights that, although Scots law requires cohabitants to prove that they have been living together "as if they were husband and wife", they are not treated like spouses.⁷ Thus, there is much that can be criticised. Although hard cases should not necessarily guide the legislature in its reform, equally the law should not lead to arbitrary results.

C. THE IMPORTANCE OF SETTING CLEAR OBJECTIVES

As Dot Reid illustrates,⁸ however, before any changes are proposed, greater clarity is required as to what needs are being catered for by the new rules and thus what objectives are being pursued and why. One of the main objectives underpinning especially the Scottish Law Commission's proposals of 2009 was "simplicity" of the rules.⁹ Yet as Gregor Christandl points out, the Commission's suggestion that courts should determine the extent to which a cohabitant should be treated like a spouse/civil partner on a case-by-case basis would defeat such objective.¹⁰ Other contributions reveal that simplicity can come at a price that may not be worth paying. Jan Peter Schmidt's paper demonstrates this with regards to the protection of the children of the deceased.¹¹ Thus, complexity can sometimes be a necessary evil.

Another important objective driving the Scottish Government's consultation of 2019 seems to have been the desire to design a law that reflects "outcomes which individuals and their families would generally expect and on which there is a degree of consensus".¹² Yet, Alan Barr¹³ shows that the Commission's proposal (accepted by the Government) to confer the entire estate on the spouse/civil partner in the absence of children can lead to results that the deceased may have never intended, e.g. where the couple were separated but not divorced. In recent years the Scottish Law Commission has also put increasing emphasis on public opinion as supported by empirical studies.¹⁴ But is public opinion necessarily always be the best guide? As the 2005 and 2015 surveys show, public opinion can change. Also, public opinion may be swayed by hard cases,¹⁵ and sometimes no clear view emerges from public attitude surveys. That said, much depends on how the surveys are carried out, what questions are asked, and who responds. Here Dot Reid rightly suggests that lawyers can learn a great deal from social scientists as to how surveys are conducted, and that they should avoid placing too much weight on the views expressed by certain members of the legal profession who represent only certain types of client.¹⁶ Even so, public opinion should perhaps be just one of the factors to be taken

⁵ Gretton (n 4) at 00.

⁶ Schmidt (n 3) at 00.

⁷ G Christandl, "Succession Rights for Cohabitants" (2020) 24 EdinLR 00.

⁸ Reid (n 2) at 00.

⁹ Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009) para 2.3.

¹⁰ Christandl (n 7) at 00.

¹¹ Schmidt (n 3) at 00.

¹² Scottish Government, *Consultation on the Law of Succession* (2019) 3.

¹³ A Barr, "Death the Leveller – Happy and Unhappy Family Succession" (2020) 24 EdinLR 00.

¹⁴ Scottish Law Commission, Report on *Succession* (Scot Law Com No 124, 1990) and Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009). On the reliance on public opinion surveys, see F Burns, "Surviving spouses, surviving children and the reform of total intestacy law in England and Scotland: Past, present and future" (2013) 33 Legal Studies 85 at 108-109.

¹⁵ I am indebted to Lord Drummond Young for this point.

¹⁶ D Reid (n 2) at 00.

into account. Nor should the difficulty of achieving full public consensus be a reason for halting a reform that is long overdue.

Once the objectives are clear, different technical choices are to be made and preferably in a consistent manner. For instance, if one of objectives is that children should benefit together with the surviving spouse/civil partner, this can be achieved by choosing either a slab or a fractional system but, as Kenneth Reid shows, whatever the choice, the same system should apply in case of intestacy and testacy. Equally, if another objective is to guarantee that the spouse/civil partner continues living in the family home then that can be achieved by ways other than giving the spouse/civil partner ownership of the house, e.g. by granting the spouse/civil partner a right to live in the property, as is the case in many Civil law jurisdictions.¹⁷

D. THE NEED FOR A HOLISTIC APPROACH

Not only is it crucial to be clear about the objectives that are being pursued, but it is also vital that the rules of intestacy are not looked at in isolation. In other words, reform in this area should take account of the fact that the operation of intestacy rules is intimately connected to other areas, not just of succession law but also beyond. For this reason, Kenneth Reid suggests that there be an alignment of the protection on intestacy with the protection in case of testacy, and that a reform of the former must come first.

Similarly, George Gretton¹⁸ and Jan Peter Schmidt show the need to pay greater attention to the interface between intestacy rules and family law, more specifically the patrimonial regime as it currently operates on divorce. In other words, coordination between matrimonial property law and succession is needed, especially if the tendency is for couples to own property jointly.¹⁹ In fact, a reform of current rules should consider not just how frequently couples co-own their home but also the effect that the existence of will-substitutes,²⁰ such as special destinations, have on the distribution of the estate. Thus, a more holistic view has to be taken if intestacy rules are to work properly and in line with the objectives they were meant to achieve.

E. THE VALUE OF COMPARISON

Kenneth Reid has shown that, in the context of intestacy, Scots law has often taken inspiration from south of the border. This is not, however, where the Scottish Government has invited us to look for solutions. Instead, and for reasons that are unclear, it has suggested that inspiration should be found in British Columbia (Canada) and in Washington State (USA). The law in neither of these jurisdictions, however, seems to be particularly fitting. While the British Columbia model is relatively new, so that it is difficult to judge what problems it may give rise to in practice, the Washington model, for reasons pointed out by both George Gretton and Jan Peter Schmidt, poses particular difficulties in the Scottish context.

¹⁷ Schmidt (n 3) at 00.

¹⁸ Gretton (n 4) at 00.

¹⁹ Schmidt (n 3) at 00.

²⁰ For an overview of will-substitutes in Scots law, see D Carr, "Will-Substitutes in Scotland" in A Braun and A Röthel (eds), *Passing Wealth on Death. Will-Substitutes in Comparative Perspective* (2016) 79.

This is not to say that comparative law cannot or should not play an important role in the reform, even though possible solutions may sometimes lie closer to home than we think.²¹ On the contrary. The point is rather that, while it is useful to look for inspiration elsewhere, it is important to choose one's models with care and to justify the choices. In fact, as several contributions have pointed out, it is somewhat surprising that the Scottish Government has not looked at models drawn from Civil law, especially given the "important structural commonalties between Scottish law and its Civilian counterparts".²²

F. CONCLUSION

Even though reform in this area is difficult, the answer to current problems cannot simply be to try to persuade more people to make wills.²³ Of course, Dot Reid²⁴ is right in pointing out that the lack of public information (or one could say too much misinformation)²⁵ regarding succession rights in case of intestacy needs addressing, and, as Alan Barr states,²⁶ it is highly desirable that people should make wills. But this cannot be a justification for maintaining deficient intestacy rules. The response must rather be to try to remedy the deficiencies referred to above and to do so by: setting clear objectives; choosing techniques that reflect such objectives (whether they are home-grown or taken from elsewhere); ensuring that intestacy rules operate as much as possible in harmony with testacy rules, will-substitutes but also matrimonial property law; and, overall, striving to achieve a balance between simplicity and a need to protect more than just the interests of the surviving spouse/civil partner.

This may well mean that the Scottish Government (or the Scottish Law Commission where, it is suggested, the reform should be sent back to) may have to reconsider some of its earlier decisions including, for instance, the decision to leave in place the distinction between heritable and moveable property, but also the decisions not to reform legal rights, and to leave the entire estate to the spouse/civil partner in the absence of any children. A renewed attempt at reforming intestacy rules may also provide an opportunity to consider whether and, if so, how intestate succession law can provide compensation for those who cared for the deceased free of charge – an issue of huge practical importance, which has not, so far, been considered by either the Law Commission or the Scottish Government.

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²¹ See Schmidt (n 3) at 00 where he refers the possibility of a liferent in the matrimonial home which was considered during the debates leading up to the Succession (Scotland) Act of 1964.

²² Schmidt (n 3) at 00.

²³ K McK Norrie, "Reforming Succession Law: Intestate Succession" (2008) 12 EdinLR 77 at 80.

²⁴ This point was raised during the Symposium but is also referred to indirectly in D Reid (n 2) at 00.

²⁵ Here see the point Christandl (n **Error! Bookmark not defined.**) at 00 has made with regards to cohabitants who believe that they will inherit even though that is not the case.

²⁶ A Barr (n 13) at 00.

* I would like to thank Jan Peter Schmidt and Kenneth Reid for their helpful comments.